STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 23, 2007
v	No. 263941 Oakland Circuit Court
JOSEPH WESLEY STEWARD, Defendant-Appellant.	LC No. 2004-198129-FC

Before: Donofrio, P.J., and Bandstra and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of three counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b (multiple variables). The trial court sentenced defendant to concurrent prison terms of 17 years, 6 months to 50 years for each CSC I conviction. Because an improper polygraph examination reference was harmless, defendant was neither denied a fair and impartial trial, nor the effective assistance of counsel. The trial court properly scored defendant's sentencing guidelines. We affirm.

Defendant argues that he was denied a fair trial due to an improper reference to the possible administration of a polygraph examination to the mother of the complainant. We review an issue of constitutional law de novo. *People v Hickman*, 470 Mich 602, 605; 684 NW2d 267 (2004). Generally, evidence relating to a polygraph examination is inadmissible. *People v Jones*, 468 Mich 345, 355-356; 662 NW2d 376 (2003); *People v Nash*, 244 Mich App 93, 97; 625 NW2d 87 (2000). Although the results of a polygraph test are not actually admitted, but implied, error occurs. *People v Smith*, 211 Mich App 233, 234-235; 535 NW2d 248 (1995). References to polygraph tests, however, do not always constitute error warranting reversal. *Nash, supra* at 98. We examine the following nonexhaustive factors and determine any prejudice by the reference, requiring reversal:

> (1) [W]hether defendant objected and/or sought a cautionary instruction; (2) whether the reference was inadvertent; (3) whether there were repeated references; (4) whether the reference was an attempt to bolster a witness' credibility; and (5) whether the results of the test were admitted rather than merely the fact that a test had been conducted. [*Nash, supra* at 98 (citations omitted).]

This exchange occurred between the assistant prosecutor and Rita Pierce, a Child Protective Services employee during trial:

> *Q.* . . . [W]hy did you come to the conclusion that it was appropriate to remove [the complainant] and her brother and sister from the custody of their mother?
>
> *A.* It was my belief that [the complainant] was coerced into writing the letter.
>
> *Q.* And what did you use for the basis of your opinion?
>
> *A.* After speaking with the mother and her not -- basically she was asked to take a lie detector test about -- . . . .

Defense counsel objected, and the assistant prosecutor stated, "Judge, this is the formulation for her opinion. This is not with respect to anything to do with the defendant." After a conference off the record, the trial court instructed the jury to disregard the testimony about a lie detector test in its entirety because it was irrelevant and should have no bearing on the case. Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

The reference may have negatively impacted the credibility of the complainant's mother, who testified that she did not influence the complainant to write a recantation letter. But the trial court did not admit results of a polygraph examination if one actually occurred. And, the jury was not aware of the existence of polygraph results indicating deception from the complainant's mother. The record shows that the prosecutor did not elicit the response, and the reference was inadvertent[1] and isolated to one instance. The reference's potential for a negative impact was not significant and defendant was not prejudiced to the extent he was denied a fair trial. As a result, the trial court did not err in failing to order a mistrial.

Defendant next argues the denial of a fair trial based on numerous instances of alleged prosecutorial misconduct. A preserved claim of prosecutorial misconduct is reviewed de novo. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). We review an unpreserved claim of prosecutorial misconduct for plain error affecting defendant's substantial rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). The alleged prosecutorial misconduct is measured against defendant's right to a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). When the prosecutor interjects issues broader than the guilt or innocence of the accused, a defendant's opportunity for a fair trial is at risk. *People v Rice* (*On Remand*), 235 Mich App 429, 438; 597 NW2d 843 (1999). "The propriety of a prosecutor's remarks depends on all the facts of the case." *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). Generally, appellate review of alleged improper prosecutorial remarks is precluded absent an objection because the trial court is deprived of its opportunity to cure the error. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). But an exception

[1] Because we conclude that the assistant prosecutor did not purposefully elicit the improper reference, we reject defendant's derivative claim of prosecutorial misconduct.

exists where a failure to consider the error would result in a miscarriage of justice or if a curative instruction could not have eliminated the prejudicial effect. *Id.*

Defendant primarily complains of alleged improper testimony solicited by the prosecutor from witnesses who defendant claims improperly opined on whether they believed the complainant's allegations. A lay witness may not give an opinion on the believability of the complainant's allegations, *People v Smith*, 425 Mich 98, 113; 387 NW2d 814 (1986), because the jury has the sole authority to determine whether a particular witness was credible, *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). Further, a witness is not permitted to comment on the credibility of another witness. *Id.*

While a review of the record reveals that some of the challenged testimony may have been improper, the prosecutor elicited testimony from an expert to explain the generalities found within sexually abused children to explain why children recant, and to explain the circumstances that lead to such recanting. The complainant testified in depth, and the jury had an opportunity to view her demeanor and assess her credibility first hand to determine whether her circumstances were consistent with those circumstances discussed by the expert witness. Moreover, any prejudicial effect could have been cured by a contemporaneous curative instruction. *Stanaway, supra* at 687.

Defendant further argues that testimony the prosecution elicited from the complainant improperly denigrated the defense because it may have implied that defense counsel was involved in suggesting the complainant write a letter recanting her allegations against defendant. Importantly, the prosecution did not directly solicit the complainant's reference to defendant's attorney. Defendant is not entitled to relief based on this claim because a contemporaneous curative instruction could have cured any prejudicial effect. *Stanaway, supra* at 687.

Defendant also asserts that the prosecution committed misconduct by asking the complainant about bringing a Mother's Day gift to court for her mother. However, the question was trivial and did not significantly bolster the complainant's testimony. Defendant's final claim of prosecutorial misconduct is that the assistant prosecutor improperly argued matters not in evidence in support of the complainant's credibility. This allegation is simply inaccurate and the claim of error is without merit. On the claims of prosecutorial misconduct, defendant was not denied a fair trial.

Defendant next argues that his trial counsel was constitutionally ineffective for failing to object to a number of alleged errors during trial and for failing to request an independent, physical examination of the complainant. Defendant failed to seek a new trial or a *Ginther*[2] hearing before the trial court.[3] "When no *Ginther* hearing has been conducted, our review of the

[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[3] After defendant was convicted, he filed a claim of appeal in July 2005, and approximately 18 months later filed an untimely motion for remand for a *Ginther* evidentiary hearing. This Court denied that motion for the reason that "it was not filed within the time required by MCR 7.211(C)(1)(a)."

defendant's claim of ineffective assistance of counsel is limited to mistakes that are apparent on the record." *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005).

Constitutional error warranting reversal does not exist unless counsel's error was so serious that it resulted in a fundamentally unfair or unreliable trial. *Lockhart v Fretwell*, 506 US 364, 369-370; 113 S Ct 838; 122 L Ed 2d 180 (1993); *People v Pickens*, 446 Mich 298, 312 n 12; 521 NW2d 797 (1994). To establish a claim of ineffective assistance of counsel, a defendant bears a heavy burden. *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). Specifically, a defendant must show that counsel's performance was objectively unreasonable and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *Id.* at 600. In addition, there is a strong presumption that defense counsel's performance was sound trial strategy. *Id.*

The majority of defendant's claims regarding ineffective assistance are without merit because failure to make a futile objection does not constitute ineffective assistance of counsel. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004). And while defense counsel's failure to object to some of the apparent improper opinion testimony concerning the credibility of the complainant may have been "objectively unreasonable," defendant has failed to establish that there is a reasonable probability that the result of the proceeding would have been different given all the testimony presented at trial.

Defendant further argues that defense counsel should have requested an independent physical examination of the complainant and should have further cross-examined the physician who physically examined the complainant. That physician testified that she was unable to determine if the complainant had been sexually assaulted. Defense counsel may strategically accept the concession. Defendant has attached to his brief appendices on which he relies to speculate that given her testimony that defendant sexually penetrated her too many times to count, a physical examination should have plainly shown that the complainant had not engaged in the degree of sexual intercourse described. Because it is well-established that a party may not enlarge the record on appeal, we have not considered this proffered evidence in our decision on this issue. *Nash*, *supra* at 99. Nevertheless, we have reviewed this issue, and from the record, we have found no error and conclude that a *Ginther* hearing is not necessary concerning defense counsel's representation. See, e.g., *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994) (concluding that, based on the record, the defendant had failed to meet his burden that defense counsel was constitutionally ineffective and also that a *Ginther* hearing was unnecessary concerning defendant's speculative alibi defense that was not referenced in the record).

Relying on the rule pronounced in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), defendant next argues that *People v Drohan*, 475 Mich 140; 715 NW2d 778 (2006), was wrongly decided. However, defendant's argument fails because this Court is bound by decisions from our Supreme Court, *Boyd v W G Wade Shows*, 443 Mich 515, 523; 505 NW2d 544 (1993), including *Drohan* where our Supreme Court held that *Blakely* does not apply to sentences imposed in Michigan that are, as in this case, below the statutory maximum. *Drohan*, *supra* at 160.

Defendant next argues that the trial court improperly scored OVs 4, 10, 13, and PRV 7 because the record is insufficient to support the scoring of those variables. A sentencing court has discretion in scoring variables if record evidence supports a particular score. *People v*

Hornsby, 251 Mich App 462, 468; 650 NW2d 700 (2002). "'Scoring decisions for which there is any evidence in support will be upheld.'" *Id.* (citation omitted). Defendant has preserved the alleged improper scoring error of OV 10 because it was raised, MCR 6.429(C), but he has waived the remaining alleged scoring errors by acceptance of the scoring. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Nonetheless, we have reviewed all of defendant's assigned scoring errors.

Regarding OV 4, MCL 777.34(1)(a), ten points are properly scored when "[s]erious psychological injury requiring professional treatment occurred to a victim." There is evidence in the record that the complainant has undergone psychological counseling because of the sexual abuse. The record adequately supports the scoring of OV 4 at 10 points.

Regarding OV 10, MCL 777.40, a sentencing court properly scores 15 points if a defendant's conduct was predatory. "'Predatory conduct' means preoffense conduct directed at the victim for the primary purpose of victimization." MCL 777.40(2)(a). This Court has concluded that, following a conviction for second-degree criminal sexual conduct, MCL 750.520(c)(1)(a), the scoring of OV 10 at 15 points was proper where the defendant assaulted the victim when no others were present in the home and in an area of the home that was isolated and secluded. *People v Witherspoon*, 257 Mich App 329, 336; 670 NW2d 434 (2003). Similar to the circumstances in *Witherspoon*, record evidence indicates that the assaults took place in seclusion when no others were present. The record evidence adequately supports the scoring of OV 10 at 15 points.

Regarding OV 13, MCL 777.43(1)(a), 50 points are properly scored where "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more sexual penetrations against a person . . . less than 13 years of age." The complainant testified that defendant penetrated her with sex toys and his genitalia on numerous occasions before she was 13 years old. While Count III of the information provides that defendant committed the last act of CSC I while the complainant was at least 13 years old, a sentencing court is not limited to the information that resulted in a conviction but rather may consider all record evidence before it. *People v Ratkov* (*After Remand*), 201 Mich App 123, 125; 505 NW2d 886 (1993), remanded on other grounds 447 Mich 984 (1994). The record adequately supports the scoring of OV 13 at 50 points.

Regarding PRV 7, MCL 777.57(1)(a), 20 points are properly scored where "[t]he offender has 2 or more subsequent or concurrent convictions." The trial court correctly assessed 20 points for PRV 7 because defendant had two or more concurrent convictions. Defendant relies on *United States v Hazelwood*, 398 F3d 792 (CA 6, 2005),[4] for the proposition that the trial court improperly double counted PRV 7 at 20 points and OV 13 at 50 points. However, *Hazelwood* is distinguishable because it involved a trial court that, under the federal sentencing guidelines, improperly enhanced the defendant's sentence for a felony-firearm conviction by enhancing the sentence for essentially the same conduct, i.e., where the defendant both

[4] As a decision of a lower federal court, *Hazelwood* is not binding precedent in this Court. *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004).

brandished a weapon and made a threat. *Hazelwood*, *supra* at 800. That rule of law was based on the appellate court's prior interpretation of the language of federal sentencing guidelines. See *id.* at 799-800. Defendant's reliance on *Hazelwood* is misplaced because our sentencing guidelines do not contain a similar restriction for CSC convictions.

Affirmed.

/s/ Pat M. Donofrio
/s/ Richard A. Bandstra
/s/ Brian K. Zahra